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SUPREME COURT, U. S.
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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1972

No. 72-1133

ROBERT MORRIS, et al.,
Petitioners,

vs.

WERNER CONTINENTAL, INC., et al.,
Respondents.

BRIEF OF RESPONDENT, WERNER CONTINENTAL, INC.

GEORGE W. WEBER, JR.
of
SCHMIDT, EFFRON, JOSSELSON
& WEBER
700 Atlas Bank Building
524 Walnut Street
Cincinnati, Ohio 45202

Of Counsel:

JACK B. JOSSELSON
THOMAS D. FEINBERG

COURT INDEX PRESS, INC. — 809 Walnut Street, Cincinnati, Ohio 45202 — (513) 241-1450

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STATEMENT OF THE CASE

Some coloration of facts by an advocate to further his cause may not be too unusual, but it is exceptional to find a plethora of distortions such as are set forth in the Petition. The following are some of the most flagrant examples:

1. The statement (repeated about four times) that the grievants were not allowed to remain in the hearing room at any time except when they were giving their

individual testimony and that they were excluded from hearing anyone else testify, whereas it is clear from the record that all the witnesses and all the parties sat in on the hearing during the whole time that the matter was being presented to the Ohio Joint State Committee. A similar claim was made by counsel for petitioner in the Court of Appeals and the error of his statement was specifically pointed out to him at that time.

2. The claim that Mr. Morris had never participated in a grievance hearing before and that he was attending his first grievance session, whereas, again, the record clearly reveals that Mr. Morris had been active in the affairs of the Teamster's Local 100 over a period of years and that he had appeared before the Joint State Committee on grievances on prior occasions, possibly some three or four times.

3. The District Court's ruling on March 12, 1968, is completely distorted.

4. The statement that "most" of the grievants did not appear at the April 17, 1968 (the correct date) meeting, whereas, in truth, only two to four members of Local 957 had been erroneously notified by their business agent that the hearing was to be held on April 18 rather than April 17 and did not appear. Nevertheless, the business agent of Local 957, who favored "dovetailing" did appear and in addition to representatives from Locals 100, 413 and 407, sixteen employees of Werner Continental, twelve of whom were former Continental drivers, appeared. Furthermore, at the May 15 meeting when a decision was announced, Mr. Morris and Mr. Kingery were again present and also four employees of Continental (none from Werner) attended including two from Local 957. At that meeting, the chairman of the Committee again inquired whether there was any additional evidence to be presented

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and the employees of Continental had nothing further to offer.

5. The nature, purpose and effect of the so-called "inconsistent rulings" (actually constituting mere advisory opinions) of January 12 and February 23, 1968, are distorted.

6. The contents of the I.C.C. order are incorrectly stated. The order, in fact, recited that Werner Transportation Co. was authorized "to acquire control of Continental for merger of operating rights and properties into Werner for ownership, management and operation." It might also be here noted that petitioner fails to mention the fact that the Securities & Exchange Commission considered the transaction to be a purchase.

7. The allegation set forth as a "statement of fact" that the members of the Joint State Committee "presumably have a direct, mercenary interest in the outcome of litigation" is untrue.

The entire so-called "Statement of the Case" presenting a distorted, prejudiced, argumentative, and incorrect picture of the facts, we believe it advisable to give a true account thereof.

Mr. Harvey Werner, president of Werner Transportation Co., a very successful company (earnings after taxes being over a million and a half) was interested in buying some additional operating authority. Having knowledge that Continental Transportation Lines, Inc. (hereinafter referred to as Continental) had some operating rights not possessed by Werner which might be acquired, Mr. Werner attempted to buy the rights or the assets of Continental. Continental had been losing money (its income having declined precipitously).

Mr. Harris, president of Continental, would not sell his stock or assets (primarily for tax reasons) so with considerable reluctance and to appease Mr. Harris, Mr.

Werner finally acceded to a method of acquisition in the form of a statutory merger (non-taxable). Three hundred thousand shares of non-voting preferred stock in Werner Continental (convertible into common, each share of preferred exchangeable for .85 sh. of common) were issued for all the stock of Continental. Mr. Werner, himself, owned or controlled about 47 to 48% of the common stock of Werner Continental (456,825.4 shares).

From the inception of the negotiations and at the time of the acquisition, it was clearly understood that the surviving corporation, namely, Werner Transportation Co., and Mr. Werner himself as president of the company, would be in sole control of all phases of the operation irrespective of the manner or form in which the transaction would be consummated. The only concessions made by Mr. Werner were that the name of the surviving company (Werner Transportation Co.) would be changed to Werner Continental, Inc. and that two representatives of Continental (one being Mr. Harris) would be on the seven man board. Mr. Werner was and continued to be president, all of the other officers of Werner Transportation Co. and the other five directors were to constitute the officers and board of Werner Continental. This retention of authority by Werner proceeded all down the line — the operations were moved from the old Continental terminals into the Werner terminals, the terminal managers of Werner Transportation Co. were retained as the terminal managers of Werner Continental with the former managers of Continental being demoted to assistant managers. Mr. Harris, as Chairman of the Board, admitted that he had very little to say in the operation of the company, his primary function merely being that of conducting meetings of the Board of Directors. Any other duties, which were of a minor nature, were only such as were assigned to him by Mr. Werner.

Werner Transportation Co. was a party to a contract with the Teamster's Union which provided that:

> "Any controversy over the seniority standing of any employee on the seniority list shall be submitted to the grievance procedure."

The agreement further provides for an Ohio Joint State Committee (hereinafter referred to as OJSC) consisting of ten men, 5 employer and five union representatives, to hear and decide grievances.

The national labor agreement provided that:

> "area and/or state committees created pursuant to local supplements which have previously established rules of seniority . . . approved by the joint area committee may continue to apply such rules if such rules are reduced to writing."

OJSC had reduced to writing its previously established rules of seniority which were as follows:

> "The established Ohio practice is that employees of the purchased company are placed at the bottom of the seniority list of the purchasing company. The past practice shall continue to apply to all Ohio domiciled employees, except in the event of merger when the seniority of the employees affected shall be dovetailed by chronological listing unless otherwise mutually agreed to by the parties."

Hence, the contract gives to OJSC the final authority for the interpretation of any provisions in the contract and makes it the final arbiter of all disputes regarding the application of any terms in the contract.

After acquisition by Werner of Continental, inquiry was made of OJSC as to seniority rights. There were two rulings, in the nature of advisory opinions rendered without any hearing, which basically were to the effect that the

question of seniority would depend on whether the transaction was a merger or purchase. Because Werner's vice president, on the first request, had used the word "merger", OJSC stated that in such cases, the employees should be dovetailed but if the facts were otherwise, they should be reported to the Committee. Thereupon Mr. Werner himself wrote to OJSC stating that the acquisition of Continental was "a purchase in the form of a merger to avoid a taxable transaction." Acting on this statement, the Committee stated that Werner employees were entitled to seniority. Prior to this "ruling" (as early as January 17, 1968) Mr. Morris, the named petitioner, had consulted a very reputable and capable local law firm (not the present counsel). When Werner Transportation drivers were accorded seniority (in contrast with dovetailing) Mr. Morris, on March 1, 1968 (through his attorneys), prematurely filed the action in the United States District Court, Southern District of Ohio, Western Division. Subsequent to the institution of this litigation, grievances were filed by the former Continental drivers. The action in Court was continued pending a hearing by OJSC on the grievances, to which Mr. Morris' attorneys made no objection. OJSC then set a date for a hearing on the grievances.

At the hearing before OJSC on April 17, 1968 (of which all parties had adequate notice) plaintiff Morris presented the case for the ex-Continental drivers. He had in his possession more evidence than any of the officers or business agents. He even had legal citations. He presented a volume of documentary evidence. A full and thorough hearing was given to all parties. OJSC extended to everyone the opportunity to present additional evidence.

Now, because the drivers of both companies (Werner and Continental) belonged to the same locals, all the officers and agents of those locals (with one exception)

took a neutral position not wishing to incur the ill will of either set of drivers. The one exception was Mr. Kingery of Local 957 who took the position and strenuously maintained that the drivers should be dovetailed. Mr. Morris assumed the rule of advocate for all the ex-Continental drivers.

It should be noted that none of the five union representatives who sat on this hearing had ever been employed by either Werner Transportation or by Continental. The five employer representatives had never worked for either company nor represented either company in any capacity. They had no connection of any kind with Werner that would afford any reason whatsoever to warrant any charge of bias. The record indicates that all of the 10 men were disinterested and any belated charge of bias or prejudice is entirely unfounded. Not one of them can possibly be considered as a party to the case as no one of them would be affected by the result and no one of them had any reason to be prejudiced or partial.

The rule of OJSC (in writing designated as the Ohio Past Practice and "incorporated in the Central States JAC Rules for application of seniority") differentiating between "purchase" and "merger" originated many years ago and had been consistently applied. The rationale of this rule followed by the Committee may be summarized as follows: Usually and probably the company which purchases another is the more successfully operated of the two; part of its success should be attributed to a more efficient group of employees; hence, the employees who helped the employer to succeed should not be penalized in favor of those employees who probably were less efficient and whose possible inefficiency was to some extent responsible for the lack of success of the "purchased" company.

After the hearing, OJSC deliberated for approximately one month, then called another hearing on May 15, 1968.

At that meeting, the committee again asked if anyone had any additional evidence. There being no further evidence offered, the committee retired and then announced its decision — unanimous — that the transaction be viewed as a purchase and that the drivers of Werner Transportation Co. (the surviving company) be accorded seniority.

Not one of the Continental drivers (including Mr. Morris and their attorneys) ever questioned the right or authority of OJSC to hear and determine this case until after the decision on May 15, 1968. No one ever raised any question as to the qualifications of the ten members of the Committee who heard and decided this case; no one ever raised an issue of bias or prejudice or requested the removal of any of the ten men. Only after the decision on May 15, 1968, adverse to Petitioners were such claims made in the District Court.

ARGUMENT

The case of *Humphrey* v. *Moore,* 375 U.S. 335, 11 L.ed (2d) 370 (1964) is conclusive and further argument should be unnecessary. That case alone writes the quietus to all of Petitioners' contentions.

As has been set forth in our Statement of the Case, Petitioners' attacks against the hearing before the Ohio Joint State Committee are based upon fabricated claims. All the persons interested in the hearing were permitted to remain in the hearing room during the whole course of the proceedings. Mr. Morris had experience in grievance hearings. Mr. Morris and the other Continental drivers had the benefit of advice of counsel for some three months prior to the hearing on April 17, 1968. After this hearing, they and their counsel had another 28 days to raise any questions and to produce any further evidence.

At the hearings, Petitioners were permitted to present their case fully. Mr. Morris, quite obviousy well prepared by his counsel, presented everything fully and effectively. No one was denied the opportunity to speak or to produce further evidence. If the few witnesses absent at the hearing on April 17th were aware of any new or further evidence or arguments, those who were present at the May 15th meeting were given the opportunity to produce such.

Not a single fact is set forth to indicate any reason for bias by any of the Committee members. Petitioners state, without any basis but their own say-so, that "in theory" the union members should have advocated the cause of Petitioners. But why? Both Werner drivers and Continental drivers were members of the same union. No reason for favoritism existed. If they "in theory" should be advocates, for what possible reason should they necessarily advocate the ex-Continental drivers' cause rather than the Werner drivers? The Werner drivers were entitled to the same consideration and treatment as Petitioners. Any discrimination against them should certainly not be permissible. It seems axiomatic that "in theory" the union members of the Committee should not be "advocates" for either group of drivers; that, as was true here, it is highly preferable that the members of the Committee withhold judgment until they had heard the evidence.

Petitioners state that the five trucking industry officials would act to protect the trucking industry, but why should they have any reason "to protect" Werner Continental, a company with which they had no relations of any kind? It would matter naught to them if Werner Continental was required to "dovetail" or to give seniority privileges to the ex-Werner drivers. Why should there be any reason for "collusion" and "trading"? No one on the Committee was offered any inducement of any kind to influence his decision.

As stated by Mr. Justice White in *Commonwealth Corp. v. Casualty Co.*, 393 U.S. 145 (1965) at p. 151:

> "The judiciary should minimize its role in arbitration as judge of the arbitrator's impartiality."

Certainly mere conclusions and innuendoes form no basis for a Court's questioning the decision of the Joint State Committee. In this case, Petitioners, by resort to conclusions having no factual basis and by a flagrant disregard of facts, attempt to create an illusion of an unfair hearing when, in fact, the record clearly reveals a thorough and unbiased hearing and decision (unanimous) by the Joint State Committee.

To follow Petitioners' argument to its logical conclusion, the Joint State Committee would be outlawed in grievance procedure. It will always consist of five men from the Teamsters' Union and five employer-members. If, as Petitioners allege, these members are "ten inherently biased 'arbitrators' " and if there is an "inherent bias in such grievance panel," the Petitioners must be advocating the abrogation of the express provisions of the bargaining agreement. In the absence of such agreement, no employee would have any claim to seniority — the employer would be free to make decisions without any outside influence. Hence, Petitioners must rely on the bargaining agreement as to seniority rights but then inconsistently seek to sabotage and to render nugatory the very method and procedure by which seniority rights are determined under the bargaining agreement.

Petioners claim that "due process" was violated by the Committee's rule against a lawyer being present to represent a party. This rule, of course, applied to the Werner drivers as well as to Continental's. We repeat that Mr. Morris and the Continental drivers had legal advice for several months prior to the hearing. The drivers and their

lawyer voiced no objections to the hearing and they were, or at least should have been aware of the rules.

The Sixth Amendment providing for assistance of counsel is subject to the "criminal prosecution" limitation and has no applicability. Even in administrative hearings, the right to representation by counsel is not an essential ingredient to a fair hearing in all types of procedure.

> See *In re Groban*, 352 U.S. 330, 336, 1 L.ed.2d 376 (1957)

If a hearing is adjudicative in nature and a right to be affected by the administrative adjudication is a constitutionally protected right, then a denial of counsel may indicate a lack of fairness. No one has a constitutional right to "seniority." Seniority is created by collective bargaining agreements and is not a vested right. Seniority rights and claims arise exclusively from the labor-management contract.

> *Ford Motor Co.* v. *Huffman*, 345 U.S. 330, 97 Led 1048 (1953)
> *Charland* v. *Norge Division, Borgman-Warner Corp.*, 407 F2d 1062 (CA 6 1969) Cert. denied 395 U.S. 927

This is emphasized by the express proviso in the rules of practice of the Ohio Joint State Committee which concludes with the phrase "unless otherwise mutually agreed to by the parties."

By the collective bargaining agreement executed by Mr. Morris' union by which he, as a member of that union is bound, the grievance procedure provided for a hearing by the Joint State Committee; the rules of the Joint State Committee never permitted any party or any witness to be represented at the hearing by an attorney. Thus, no grounds for complaint can possibly exist. Morris, as a member of the union, his bargaining agent, had impliedly

agreed to abide by the rules and the decision of the Ohio Joint State Committee. Morris and the other ex-Continental drivers were accorded all the privileges and rights to which they were entitled.

As heretofore decided by this Court, to be entitled to any relief, a plaintiff must prove "arbitrary or bad faith" upon the Union, *Vaca* v. *Sipes,* 386 U.S. 171, 17 L.ed (2d) 842 (1967) and produce "substantial evidence of fraud, deceitful action or dishonest conduct" *Humphrey* v. *Moore,* 375 U.S. 335, 11 L.ed. (2d) 370 (1964). In the recent case of *U.S. Bulk Carriers* v. *Argnella,* 400 U.S. 351 (1970) Mr. Justice Harlan stated (p. 362, 363):

> "Indeed, this Court's decisions in the Steelworker Trilogy [*U.S. Steelworkers* v. *Amer. Mfg. Co.,* 363 U.S. 564 (1960); v. *Warrior & Gulf Navigation Co.,* 363 U.S. 574 (1960); v. *Enterprise Wheel & Car Corp.,* 363 U.S. 593 (1963)] makes very clear that the scope of judicial review of the arbitrator's judgment where the matter of contract rights are concerned is limited to a threshold determination of the dispute.
>
> "*The extreme limitation of judicial review* and the expansive reading of consent are both important to the task of effectuating national labor policy; both are legitimized, in my view, by the derivation of the individual's substantive legal right from the collective bargaining agreement." (emphasis supplied)

To impose a requirement on the union, as part of its grievance procedure, particularly as to seniority rights, that it permit parties to be represented by counsel would open up a Pandora's box and would contravene the legal principles heretofore enunciated so clearly and frequently by this Court. The Courts have consistently found that procedures under the Teamsters collective bargaining agreements not to be unfair.

General Drivers v. *Riss & Co., Inc.*, 372 U.S. 517, 9 L.ed (2d) 918 (1963)

Humphrey v. *Moore, supra.*

Petitioners were afforded a full and fair hearing by the Joint State Committee. Its finding that the transaction was a "purchase" is in conformity with the rationale of its rule, namely, not to penalize the employees of a successful company which retained complete control after the transaction. In other words, the Committee looked at the substance, not the form. However, it is immaterial whether a Court agrees with the decision or not; the propriety thereof is not the criterion — only if a decision is "wholly baseless and completely without reason" may a Court intervene.

Gunther v. *San Diego Ry. Co.*, 382 U.S. 257, 261 (1955)

Hence, irrespective of the question whether one agrees with the Committee's findings or not, it is not the function of the Court to interpret the contract.

Steelworkers v. *American Mfg. Co.*, 363 U.S. 564, 4 L.ed 2d 1403 (1960)

The decision of the Committee was final and not subject to review.

In conclusion, even assuming arguendo, the truth of the Petitioners' claims and disregarding the misstatements of the evidence, any complaints against the fairness of the hearing have been effectively and finally foreclosed by the failure of Petitioners (and their counsel) to raise any of their present objections until after the Joint State Committee decided adversely to their claim for dovetailing.

The pleas of Petitioners about the "untrained" Mr. Morris must fall on deaf ears. All the present complaints

about the Joint State Committee and its personnel mysteriously revealed themselves after the Joint State Committee decided against the Petitioners but, in fact, if such defects actually existed, they would have been just as obvious to Petitioners, and to the attorneys who represented them, in March, 1968, as today. The Petitioners and their attorneys could have then raised objections to a hearing by the Joint State Committee in the hearing in the United States District Court some thirty days prior to the hearing before the Committee; they then had the opportunity to raise the question at the hearing on April 17, 1968; Petitioners and their attorneys then had another 28 days to discuss the question and had ample time and opportunity to raise the objection on May 15, 1968. What has preceded clearly refutes the claims of Petitioners. The case is a prime example of disgruntled losers raising belated objections.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

GEORGE W. WEBER, JR.
SCHMIDT, EFFRON, JOSSELSON & WEBER

700 Atlas Bank Building
524 Walnut Street
Cincinnati, Ohio 45202
Counsel for Respondent,
Werner Continental, Inc.

Of Counsel:

JACK B. JOSSELSON
THOMAS D. FEINBERG

APPENDIX

EXCERPTS FROM RECORD

DEPOSITION OF DALE MANN, CO-CHAIRMAN OF OHIO JOINT STATE COMMITTEE:

Page 11 (p. 43 Supplemental Appendix in United States Court of Appeals of Defendant Union):

"Q. Are the presentations by either the employer or the Union made in the presence of the opposite party?

"A. Oh, yes, they are all in the room including the members.

"Q. Are witnesses ever separated?

"A. How do you mean that?

"Q. By that, I mean, are witnesses upon the request of either party, Union or employer, kept outside the hearing?

"A. No, they all set in the room.

"Q. So everyone involved, in other words, sits in that particular hearing room while matters are being presented to the Committee; is that correct?

"A. Right.

"Q. The only time that witnesses or parties are excused is while the Board or Committee, rather, deliberates to reach its decision; is that a fair statement?

"A. That's right."

Page 59 (p. 76b Appendix in United States Court of Appeals of Werner Continental, Inc.):

"Q. Now, do you know Bob Morris?

"A. Oh, yes.

"Q. How long have you known Bob Morris?

"A. Oh, many years, 16 years, I would say.

"Q. Has Mr. Morris been active in the affairs of Teamsters Local 100 over a period of years?

"A. Yes.

"Q. Has he ever appeared before the Joint State Committee on grievances prior to April of 1968?

"A. Yes, sir.

"Q. On many occasions?

"A. Oh, I would say three or four maybe."